

Engaging Offenders in Victim Offender Mediation

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The Issue

Voluntary participation in a mediation process is a significant issue in the practice of mediation. It is a basic mediation tenet that clients *choose* to participate in the process. This basic tenet is true in the practice of Victim Offender Mediation (VOM). Having said that, in VOM the voluntary participation of offenders does not look like the voluntary participation of clients in community mediation, which does not look like the voluntary participation of clients of small claims (where the judge sometimes says, "You WILL go down the hall with this mediator and try to work this out.").

Beyond the ethical question, there is little practical value in forcing someone to mediate. If participants do not have some level of commitment to the mediation process it is likely to be an unpleasant experience for everyone, including the mediator. Participants must see some potential value for themselves if they are going to willingly engage in mediation. This is as true for offenders as for any other mediation participant.

A Spectrum

In considering the voluntary nature of offenders' participation in VOM it is helpful to acknowledge that every field of mediation practice makes modifications to the general mediation process. Family mediators do not mediate exactly as do community mediators, who do not mediate exactly as do commercial mediators, who do not mediate exactly as do VOM mediators. Nor should they. If a mediator is unaware of the distinctions and unique factors of a given field of mediation practice, it will be difficult for that individual to be an effective mediator within that specific context.

This is not to say that there are not some fundamental values and mechanics that make a process genuinely *mediation*, as opposed to some other process (e.g. mediation as opposed to arbitration). And, voluntary participation would generally be acknowledged as one of the fundamentals. There is, nonetheless, a necessary variety and diversity within those fundamental parameters.

The importance of having, on some level, chosen mediation as a process to engage in is as valid for criminal offenders as for all other mediation participants. That is, offenders must see potential benefit for themselves in order to want to participate in mediation. They need to understand how a mediation process can be of value to them. Being knowledgeable of issues important to offenders and being able to connect those issues to the process of mediation is key to moving offenders to a place where they are willing to engage in

mediation. (Common issues of importance to offenders are discussed in an attached document.)

Framing the Issue for Victim Offender Mediation

Ultimately, framing of the discussion of offender participation in VOM as *voluntary* or *mandatory* is not very useful. Offender participation is *neither* voluntary nor mandatory. And, in some ways, *it is both*. If that is confusing, the tension is based in *the distinctiveness of the field of victim offender mediation*.

The working premise for the purposes of this discussion is the offenders being spoken of are individuals who have either admitted responsibility for a crime or have been found responsible by a court. *What is not voluntary for these offenders is that they will be held accountable for their offense*. They have no choice in that.

What the offenders do have a choice in is whether or not mediation is a helpful way for them to be accountable.

Engaging the Offender

Reflecting on eleven years of VOM experience, I have not found it useful to talk to an offender referred to mediation using words such as *choice* and *voluntary*. I come to the offender's initial interview with the mindset that something is going to happen in order for this offender to be held accountable. What is being explored is what will be the most helpful way for this accountability to happen – helpful for the victim, for the community and for the offender.

I explain to offenders that the community* *is seeking to find the most effective way for them to take responsibility for their offense*. The goal is for them to be held accountable in ways that make sense to the victim and the community AND that *allows them to feel they have acted in a responsible manner*. We are seeking for a way that enables them to deal with their offense, to be able *to put the offense behind them and to move forward with their lives* in a positive way (refer to attached Offender Issues). I dialogue with offenders about how mediation works and why I think it may be helpful for them to participate, *for their own sake*.

*(*from a Restorative Justice perspective the court is simply an agent of the community)*

Responding to Resistance

If the offender resists the idea of participation in mediation, I focus on trying to understand and acknowledge their concerns. I try to genuinely address the concerns (e.g. "Will this be safe?") and work through the resistance. *Genuinely* meaning I deal with the concerns honestly. If the mediation process cannot truly address their concern I tell them that.

In trying to help offenders understand how the mediation process can be positive for them as well as the victim, it is appropriate at this point to be more focused on the offender's needs than the victim's needs. "How will this help me?" is where the offender is mentally and emotionally at this point. It is both useful and legitimate to work with offenders where they presently are, not where you want them to be. *However, the value of VOM for victims, and the offender's obligation to make amends, should not be lost in the discussion.*

If, after a full discussion, it is clear the offender simply will not participate - short of my telling them they must - I will verbally confirm my sense that they do not see value in mediating the matter. I let them know I will be returning the referral to their probation counselor for the probation counselor's further consideration.

If I have decided the offender is not appropriate for mediation (e.g. unacceptable level of minimization of responsibility, potentially harmful attitude in regard to victim needs), I will tell the offender *I do not see the mediation process as a helpful or useful approach to resolving this case.* Again, I inform them I am sending the referral back to their probation counselor. (Note that I placed the inadequacy or inappropriateness on *the process* of mediation – "mediation is not appropriate" – rather than on *the individual* – "you are not appropriate").

Throughout this interview process I have neither said their participation is voluntary ("You can do this if you want to."), nor have I said it is mandatory ("You will participate in this program because you have been ordered to."). My bias, which is conveyed in my approach in the interview, is that VOM is generally an appropriate tool for properly screened cases. Unless the offender somehow demonstrates to me, through their behavior or responses, that mediation is not appropriate, I will work with them on the assumption that mediation is the best way for them to address their need to be accountable for their actions.

Some Suggested Interview Wording

Opening comments:

"John, you have been referred to our program because the juvenile court is interested in finding a way to have you take responsibility for your offense."

"The goal is assist you in being accountable to your victims in ways that meaningfully address the harms you have done to them. We want the victim to be able to move away from this incident feeling that their concerns and needs have been dealt with in a way that is helpful to them."

"At the same time we want to assist you in taking responsibility in a way that is respectful and helpful to you. Our intent is for you to be accountable for what you have done, to be able to deal with this in a responsible way, and to close this event in your life and move forward in a positive way."

If the offender responds in a manner that conveys a feeling that they have already been accountable or done enough for their offense:

“We are not ignoring what you have already done, and I’m glad to hear that you have already taken some valuable steps (e.g.. community service, counseling class).”

“Victim Offender Mediation is about *taking direct responsibility to the victim*. The ways in which you have already taken responsibility will probably be very helpful information for _____ (use victim’s first name - humanization of the victim).”

“Victims often want to know that the person who caused the harm is being held responsible. This would be a very helpful thing for you to share with them.”

“Your (court appearance, community hours, fine) are important parts of being accountable, but another important part of being accountable is taking *direct responsibility* to the person you have harmed; *giving your victim a chance to talk* about how your actions have impacted them and *what they want to see happen* in order for this matter to be resolved in a way that makes sense to them.”